MOHAMED YAHAYA v. M.S. ALLY SDN. BHD. & 11 ORS.

[O.C.J. (George J.) February 15, 1984]
[Kuala Lumpur – Originating Summons No. C137 of 1983]

Company law – Shares to be sold – Non-compliance with pre-emptive procedures – Effect of.

The plaintiff was anxious to sell his 80,000 $1.00 shares in a private limited company, M.S. Ally Sdn. Bhd., the 1st defendant Company. Transactions of shares in the Company were governed by its Articles of Association. By letter dated September 21, 1982, the plaintiff's solicitors, pursuant to Article 27, notified the Company of his desire to sell his 80,000 shares, without stating the sale price. The solicitors by a subsequent letter of October 1, 1982, stated the price to be $2.60 per share. It was common ground that October 1, 1982 was the effective date for notice under Article 27.

The pre-emptive procedures provided in the Articles required the Company, after receipt of the notice and within 28 days thereof, to offer the shares to the persons then holding the remaining shares in the Company as nearly as might be in the proportion to their holding of shares in the Company, giving a time limit for acceptance, so that in case the shares or some of them were not purchased, the unpurchased shares could be reoffered to such members who might be interested in them. The plaintiff as vendor had 6 months to find a purchaser (who could be a non-member of the Company) only after the Company had failed to find a purchaser or purchasers of the shares within the stipulated 28-day period. If there were shares still not sold after the 6-month period, the entire process had to be repeated to effect a sale of them.

The Company was unable to find a purchaser for the shares within 28 days from October 1, 1982. Thus the plaintiff had 6 months from October 29, 1982 to find a purchaser for his shares, but no sales took place.

Then by letter dated June 18, 1982, a new Article 27 notice was given and this time the Company's solicitors sought the opinion of the auditors of the Company as to the "fair value" of the shares. The auditors stated the net tangible asset value per share of the Company, based on the Company's accounts for the accounting year ended March 31, 1982, to be $1.63, which they later confirmed to be the "fair value". By letter dated July 15, 1983, the Company's solicitors informed the plaintiff that the Board of Directors had found 11 members of the Company to purchase 25,000 shares at $1.63 per share. The purchase money had been deposited with the Company's solicitors and the plaintiff was required to deliver the certificates for the 25,000 shares. This the plaintiff refused to do, thereby giving rise to the present dispute. He refused to accept the auditors' valuation. Nevertheless the Company proceeded under Article 30 and effected the transfer of 25,000 of the plaintiff's shares in favour of the 11 purchasers, whereupon the plaintiff issued the present originating summons, seeking rectification of the register of the members of the Company by striking out the names of the 11 purchasers and replacing their names with that of the plaintiff.

The issue for determination was whether the purported transaction of the plaintiff's 25,000 shares was proper.

Held: The purported transaction of the 25,000 shares was made without adherence to the requirements of the Company's Articles of Association and must be set aside.

Per Curiam: "The scheme of the pre-emptive procedures for sale of shares made it necessary for the offer for sale and acceptance of the offer to be made without a specification of the sale price. [The vendor and the purchaser] must be given the opportunity of arriving at an agreement on fair value."

ORIGINATING SUMMONS.

V. Chandran for the plaintiff.
R. Annarasa for the defendants.

George J.: At all relevant times the plaintiff held 80,000 $1/- shares in M.S. Ally Sdn. Bhd. He was anxious to sell the shares.

The Articles of Association of the Company provide the terms and conditions on which shares may be transferred and pursuant to Article 27 the plaintiff by his solicitors' letter of September 21, 1982 gave notice to the Company of his desire to sell his 80,000 shares. That letter did not specify the sale price which the Company treated as an omission and which was rectified by the plaintiff's solicitors' letter of October 1, 1982 which stated that the shares were to be sold at $2.60 per share. The Court was informed that it was common ground that accordingly the effective date of the Article 27 notice was October 1, 1982.

Pre-emptive procedures laid down in the Articles of Association provide for the Company to try and obtain a qualified purchaser within 28 days of the receipt of an Article 27 notice to do which it was required to offer the shares to the persons then holding the remaining shares in the Company as nearly as may be in proportion to their holding of shares in the Company, giving a time limit for acceptance so that in case the shares or some of them are not taken up, they may be re-offered to such members who may be interested in them. The whole exercise was to be completed within the said 28 days. It was only when the Company was not able to find a buyer or buyers for the shares (within the 28 days) that the vendor could look for a buyer (who could be an outsider) and he has 6 months from the expiry of the said 28 days to do so. After the six months if there are shares still not sold, to effect a sale of them the whole pre-emptive process has to be repeated.

The Company did not effect a sale of any of the shares within the 28 days of October 1, 1982 and it was left to the plaintiff to look for a buyer for which purpose he had 6 months from October 29, 1982.

It would seem that some time after the expiry of that 6 months the plaintiff learnt that the directors of the Company would be interested in purchasing the shares. A written offer was made by the plaintiff to the Directors of the Company. That was the letter of June 4, 1983 written by the plaintiff's solicitors to the Directors of Syarikat M.S. Ally Sdn. Bhd. by which the shares were offered at $2.60 per share the purchase price to be paid as to 50% thereof "upon the sale of shares and the remaining 50% to be paid within a period of 30 days".

The Directors by their solicitors' letter of June 9, 1983 made what was clearly a counter offer: They would buy the 80,000 shares the price to be "a fair value to be ascertained" to be paid by a deposit of $40,000.00 "on the fair price being accepted" and the balance in monthly instalments of $3,000.00 each. The Company followed the said counter offer by requiring the auditors of the Company to give their opinion of the fair value of the shares. This was purported to be done pursuant to "clause 29 of the Articles of Association".

The solicitors for the plaintiff by their letter of June 18, 1983 obviously with the intention of removing any misunderstanding of the position obtaining at that stage reminded the solicitors for the Company (who had also acted for the directors of the Company) that the notice of October 1, 1982 had expired and was ineffective. By another letter also of June 18, 1983 the counter offer was rejected. By yet another letter of June 18, 1983 a new Article 27 notice was given. By a letter of July 8, 1983 the Company's solicitors sought the opinion of the auditors of the Company as to the "fair value" of the shares. By their letter of July 9, 1983 the auditors stated that the "Net Tangible Asset value of a share of the Company was $1.63" and that that was based on the accounts of the Company for the accounting year that ended on March 31, 1982. By their letter of July 15, 1983 the auditors on being pressed to do so confirmed that $1.63 in their opinion was the fair value within the meaning of clause 29 of the Articles of Association but "based on the accounts as at March 31, 1982". By their letter of July 15, 1983 the Company's solicitors informed the plaintiff that the Board of Directors had found 11 members of the Company "who have come forward to buy 25,000 shares at $1.63 per share". The purchase price at $1.63 per share was deposited with the Company's solicitors and the plaintiff was required to deliver up the 25,000 share certificates. This the plaintiff refused to do. He refused to accept the valuation by the auditors as being the "fair value" of the shares. The Company nevertheless went ahead, purported to act pursuant to Article 30 and effected the transfer of 25,000 of the plaintiff's shares in favour of the persons who it was alleged had purchased the shares. It was only upon the plaintiff's solicitors by their letter of August 22, 1983 enquiring who those purchasers were that by a letter from the Company's solicitors received on September 7, 1983 the names of the 11 purchasers were made known to the plaintiff. On September 19, 1983 the instant Originating Summons was caused to be issued wherein the plaintiff seeks a rectification of the register of the members of the Company by striking out the names of the said 11 purchasers and replacing their names with that of the plaintiff and for orders consequential thereto.

In my judgment the purported transaction of the said 25,000 shares was made without adherence to the requirements of the Articles of Association and accordingly had to be set aside.

As had been seen, by Article 28 the Company acting as the agent of the vendor member should have, upon receipt of the Article 27 notice of June 18, 1983,

(1) first of all offered the shares to the other members of the Company in proportion to their shareholdings keeping the offer open for a specified limited period.

(2) If the shares or any of them are not taken up on that offer they or the remainder of them should have been offered to the members without the imposition of any restriction on the number of shares that could be taken up.

(3) Both the above two steps should have been taken and completed within 28 days of the Company's receipt of that notice of June 18, 1983.

No evidence was led to show that these requirements were met. By Section 114(g) of the Evi-

dence Act the presumption that arises is that the steps were not taken.

Article 29 provides for the obtaining of a valuation of the shares in the event that any difference arises between the vendor member and the purchasing member as to the fair value of the shares. It follows that the negotiation of the purchase price is a matter to be left to the vendor and the individual purchaser concerned and it is for one or the other of them to seek the opinion of the auditor which could be done if and when the negotiations failed. It also follows that the Company having found purchasers for the shares should have forthwith provided the vendor with their identity to enable the vendor and the purchasers to complete the negotiations.

In my judgment the scheme of the pre-emptive procedures for sale of shares made it necessary for the offer for sale and acceptance of the offer to be made without a specification of the sale price. Both the vendor and the purchaser will be bound to complete the sale on the basis of a purchase price which shall be the fair value of the shares with a proviso that the parties may agree on what is the fair value – clearly they must be given the opportunity of arriving at an agreement on fair value.

What in fact transpired was that the pre-emptive procedures were ignored. The vendor and the purchasers were never given an opportunity of negotiating the purchase price. The Company obtained a figure from the auditors and sought to impose that figure on the parties as being the fair value.

Now, it is only what is certified by the auditor on the application of either party to a sale that will be deemed to be the fair value. What is certified on the application of other parties (including the Company or its directors) does not necessarily have to be deemed to be fair value for purposes of Article 30. Further Article 30 specifies that such an opinion by the auditor will be regarded simply as an expert's opinion and not a finding of fact by an arbitrator. I understand that provision to mean that the auditor's opinion can be subjected to scrutiny which in my judgement on the facts of the instant case it cannot stand. *Ex facie* the fair value of a share in a going concern, on or about June 1983, cannot be the net tangible asset value of the share as on March 31, 1982. Over a year had passed since March 31, 1982 and in any event fair value must surely be the sum of the net tangible asset value and the net value of the intangibles. The omission of the value of intangibles could be a serious omission. In a service oriented business for instance, the intangibles may be worth much more than the tangible assets. When the business has been long established it may enjoy a goodwill which is an intangible asset and which may be of considerable value.

In the event I had no hesitation in granting the application in the terms of prayers a), b) and c). I also provided for the costs of the application.

Order accordingly.

Solicitors: *Shook Lin & Bok; Annarasa & Co.*

NG BROTHERS CONSTRUCTION v. KAOLIN (MALAYSIA) SDN. BHD.

[A.C.J. (Wan Hamzah J.) April 7, 1984]
[Kuala Lumpur – Civil Appeal No. 30 of 1982]

Contract law – Offer and acceptance of quotation – Subject to formal agreement – Whether binding contract – Variation – Mistake – Authority – Breach – Damages.

The respondent Kaolin (Malaysia) Sdn. Bhd. ("Kaolin") asked the appellant Ng Brothers Construction ("Ng Construction") to submit a quotation for the construction of a clay factory complex for Kaolin. Ng Construction by letter dated December 15, 1969 gave a quotation which was accepted by Kaolin by letter dated December 27, signed by its Production Assistant, stating that a formal agreement would be signed later. Ng Construction claimed that the exchange of the two letters had created a binding contract and that Kaolin by letter of January 6, 1970 had purported to determine the contract. Ng Construction therefore claimed damages for breach of contract. Kaolin maintained that as no formal agreement was signed, there was no binding contract between them.

The Sessions Court dismissed the suit of Ng Construction, holding that there was no binding contract. Ng Construction appealed.

Held: allowing the appeal: (1) on acceptance by letter dated December 27, 1969 of the quotation in the letter of December 15, there was a contract binding on both parties. Any subsequent disagreement between the parties on any proposal to vary the terms of the contract did not affect the contract.

(2) Kaolin's letter of December 27, 1969 had been issued with authority.

(3) in the circumstances, Kaolin was in breach of